# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 378

P. S. O'REILLY, M.D., PETITIONER

*v.*

BOARD OF MEDICAL EXAMINERS
OF THE STATE OF CALIFORNIA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA*

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## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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By order of the Court, dated December 4, 1967, the Solicitor General was invited to express the views of the United States with respect to this case. For the reasons stated below we do not believe that it raises any substantial federal question warranting review by this Court.

1. Petitioner is a physician who operates the California Emergency Hospital in Glendale, California. Pursuant to the United States Information and Edu-

cational Exchange Act of 1948,[1] the United States Department of State designated certain hospital programs in traumatic surgery and clinical laboratory training as "Exchange-Visitor Programs", with petitioner as their "Responsible Officer". The effect of that designation was to authorize petitioner to select qualified foreign medical students with a view to offering them training in specified aspects of medicine, and to permit those persons chosen by petitioner to enter the United States as non-immigrants using a special category of visa reserved for exchange visitors. The selection of individual students was petitioner's sole responsibility; his certification of an applicant's acceptance, transmitted to the appropriate American consular official abroad, was sufficient to obtain issuance of the exchange visitor's visa for that student. The Department of State performed no function in connection with individual applications beyond the formal determination that the applicant had been certified for this special visa.

As part of his training program, petitioner accepted Dr. Daniel Sanchez, a Mexican national, and Dr. Morimitsu Ohnishi, a Japanese national, neither of whom was licensed by the California authorities to practice medicine in that State. On August 21, 1959, both of these unlicensed doctors assisted petitioner in performing surgery. The Board of Osteopathic Examiners of the State of California found against petitioner on a charge of employing, aiding, and abetting Drs. Sanchez and Ohnishi in the unlicensed practice

[1] The revised Act is codified as 22 U.S.C. 1431-1480.

of medicine; execution of revocation of his license to practice medicine was stayed on condition of five years' probation, but he was ordered suspended from practice for 90 days.[2] That decision was ratified and adopted by the respondent Board of Medical Examiners of the State of California.[3]

Petitioner then instituted this suit in a California state court seeking to set aside the order of the Board of Medical Examiners. Both the Superior Court of Los Angeles County and the District Court of Appeal upheld the Board's decision. On further review, the California Supreme Court joined the lower courts in rejecting petitioner's defense based upon an alleged conflict between the medical licensing laws of California and the United States Information and Educational Exchange Act of 1948. The court concluded, however, that, because of the uncertainty of the preemption question and petitioner's apparent good faith, his punishment for the violation in question should be no greater than probation and it accordingly remanded the case to the Board to reconsider the penalty. (Pet. App. 6-8, 10.)

2. Petitioner argues from the premise, accepted by the court below (Pet. App. 6), that the state's licensing restrictions would to some extent frustrate the

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[2] Petitioner was also found to have engaged in a second act of unprofessional conduct not involved here, and both charges apparently were considered in determining the penalty.

[3] During the course of the proceedings, petitioner elected to become a licentiate of this Board and thus subject to its discipline.

implemenation of the federal program, to the conclusion that therefore the state law must yield by reason of the Supremacy Clause of the United States Constitution (Article VI, Clause 2). The government, however, does not share the view that such a clash of incompatible programs exists. In this connection, we respectfully direct the Court's attention to the October 5, 1962, letter sent the petitioner by the Department of State [4] in response to his inquiry detailing the position of the California authorities. In that letter, petitioner was expressly advised that, in the State Department's view, once the question of entry status is settled the participants in the Exchange-Visitor Program are subject to all state and local laws that would ordinarily be applicable, including the laws governing the practice of medicine and the training of medical personnel. Therefore, petitioner was informed, foreign nationals participating in his program must comply with all pertinent state laws and regulations.

The State Department continues to adhere to the position outlined in that letter; we submit this position is reasonable and wholly consistent with the terms and objectives of the authorizing statute, which does not contemplate supervision by the Department of State over the qualifications of individual participants.

Contrary to the implication in the petition (Pet. 2), the Department's role *vis-a-vis* these participants

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[4] For the convenience of the Court, the full text of the letter is reprinted, *infra*, pp. 6-7.

is merely to determine whether they are eligible for Exchange-Visitor visas; this determination does not involve any judgment of the professional competence or education of the applicant. See 22 C.F.R. § 63.4. Thus, in cases such as this, the United States does not purport to exercise the function—normally performed by local licensing authorities—of passing upon the professional qualifications of the applicants selected by various private "responsible officers" like petitioner.

In these circumstances, the application of California's medical licensing laws to petitioner does not conflict with either the terms or the administration of the federal statute.

## CONCLUSION

For the foregoing reasons we do not urge review.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

JANUARY 1968.

APPENDIX

In reply refer to
OCE/SP—25

October 5, 1962

Dear Mr. O'Reilly:

This office has received your letter of September 28, in which you refer to a hearing scheduled to take place in the near future when your hospital's Exchange-Visitor Program No. P-II-25 will be reviewed by the State Board of Osteopathic Examiners and the State Board of Medical Examiners of California. In your letter you requested the Department's advice with respect to the status of your program under federal and state laws.

Exchange-Visitor Program No. P-II-25 was designated on June 19, 1957, by the Secretary of State under the provisions of the United States Information and Educational Exchange Act of 1948, as amended, which has now been superseded by the Mutual Educational and Cultural Exchange Act of 1961. The effect of that designation was to authorize your hospital to select qualified foreign medical students with a view to offering them training in certain specified fields of medicine, and to permit them to enter the United States as nonimmigrants using a special category of visa reserved for exchange visitors. Neither the statute nor the designation of your program by the Secretary of State contemplated that aliens participating in your Exchange-Visitor Program would be able to do so without regard to the licensing and other laws governing the practice of medicine, and the training of medical personnel, in the State of California. It is accordingly the Department's opinion that anyone participating in your program must

abide by the pertinent laws and regulations of your State.

Your letter refers to the claim of the Boards that "the admittance of these people under the Exchange-Visitor Program No. P-II-25 is illegal". The Department would like to point out that admittance to the United States of aliens, including exchange visitors, is a matter under the jurisdiction of federal laws. Once admitted to the United States, however, the activities of an exchange visitor must comply not only with the federal law but with all applicable state and local laws and regulations.

If you have further questions regarding this matter, I would be pleased to hear from you.

Sincerely yours,

/s/ M. P. H.
MALCOLM P. HALLAM
Chief, Facilitative Services Branch
Office of Cultural Exchange

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